



U.S. Citizenship
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FILE:

SRC 05 158 52081

Office: TEXAS SERVICE CENTER Date: JUN 07 2006

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

2 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an assistant professor at the University of Texas Health Science Center (UTHSC), San Antonio. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

The petition was denied a month after it was filed, and no request for evidence was issued to allow the petitioner the opportunity to remedy any evidentiary deficiencies. The director's denial notice consists entirely of general statements about regulations and case law, with no specific discussion of the specific merits or deficits of this petitioner's claim of eligibility. The director's decision contains no information about the petitioner's claims except for the statement that the petitioner is "an assistant professor, who also conducts research and practices general family medicine." The stated grounds for denial are so generic that the petitioner has not had a meaningful opportunity to offer a substantive appeal. The wording of the decision offers no obvious indication that the author of the decision has examined the record in any detail.

Review of the record indicates that a critical issue must be addressed before a final decision is possible. The petitioner appears to present herself first and foremost as a researcher who has written several scholarly articles. In contrast, many of the petitioner's witnesses, including numerous UTHSC faculty members, emphasize the petitioner's work as a clinical physician, "serving the patients of a designated Health Professional Shortage Area."

The issue of the nature of the petitioner's work is important because there are two entirely different standards for considering a national interest waiver application. If the petitioner is first and foremost a teacher and/or researcher, then the regulations say little about judging the waiver request; the controlling case law is *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), which the director mentioned in the denial decision.

If, on the other hand, the petitioner's principal duties are to involve patient care in a designated Health Professional Shortage Area, then the regulations at 8 C.F.R. § 204.12 apply, as do the provisions of section 203(b)(2)(B)(ii) of the Act. These sections of law and regulation include several evidentiary and procedural requirements that do not apply to other aliens seeking a national interest waiver. Therefore, the director must ascertain the petitioner's principal duties before adjudication can proceed further. 8 C.F.R. § 204.12(a)(1) requires that the alien physician must agree "to work full-time (40 hours per week) in a clinical practice." If the petitioner's duties as an assistant professor are such that she cannot devote at least 40 hours per week to clinical practice, then she cannot qualify for a waiver as a physician in an underserved area, and the petition must be adjudicated pursuant to *Matter of New York State Dept. of Transportation*, focusing on other aspects of her work.

We acknowledge that the petitioner has repeatedly asserted that her waiver request is not based on a labor shortage, but this claim contradicts the assertions of numerous witnesses at UTHSC, who emphasize the petitioner's work as a clinical physician much more strongly than her efforts as a researcher and assistant professor.

The director must, therefore, ascertain whether the petitioner's waiver request is predicated on providing full-time medical care in an underserved area (in which case 8 C.F.R. § 204.12 applies), or on her impact as a researcher (in which case *Matter of New York State Dept. of Transportation* applies). The structure of the law and regulations does not permit a hybrid petition that relies on both claims through partial fulfillment of both sets of requirements.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.